

Business and Arbitration in China – Practical Guidance

by

Alexander Koff

akoff@wtplaw.com

Chair, Global Practice

Whiteford, Taylor & Preston LLP

There is significant interest (and trepidation) about doing business in China. This article notes the blasé attitudes of the past, recognizes that these days China is firmly open for business, reviews prior ASAE tips for succeeding there, and offers practical guidance to consider when considering arbitration.

Take a (Fresh) Look at China – Now Open for Business

On September 8, 1992, the *New York Times* published an Op-Ed piece, “Hey, Candidates, Look at Asia.” Lamenting that “a noticeable vacuum of ideas exists on the economic challenges posed by Asia,” the piece urges serious consideration of the Far East.

Soon after, I drafted an article for the *Cambridge Review of International Affairs* recommending instead that we “Look at China.” 15 years later, China policy is no longer relegated to the doldrums.

Now a member of the WTO, China enjoys permanent normalized trade relation status, boasts a huge trade surplus, and is rapidly becoming the economic powerhouse many predicted (and some fear). Congress is taking notice – just look at the slew of recently proposed legislation aimed squarely at Beijing, such as the Baucus-Grassley antidumping measure and the Schumer currency bill. Business is paying attention, too.

For instance, the Progressive Policy Institute’s recent “Trade Fact of the Week” highlights that 150 Chinese manufacturers “pump out about four-fifths of the world’s DVD players” – 46 million of which come to the United States (estimated at \$3.4 billion). The key fact here: “a Chinese-made DVD player contains almost 400 Western, Japanese, and Korean patents.” In other words, foreign investors design the product, own the intellectual property (IP) rights, and contract with Chinese manufacturers. The message: foreigners are doing business in China, and business is booming.

Prior ASAE Guidance – Engaging China Tips

ASAE took notice of China’s importance for business and, in December 2004, published an article about “Engaging China” (see:

<http://www.asaecenter.org/PublicationsResources/AMMagArticleDetail.cfm?ItemNumber=6423>).

Key points:

**** Make the Decision.** Give serious thought about whether to make the leap eastward.

**** Cultural Dynamics.** If you do decide to go, spend time learning the unique characteristics of doing business in China, such as understanding that who you know is critical.

**** Proceed with Caution.** Build relationships with potential partners, conduct due diligence, and identify those who know China and can help you achieve your goals.

**** Protect Yourself.** Of course protect your IP, but understand that managing a relationship based strictly on legal documents may be a mistake – while getting it in writing helps, personal relationships matter.

Consider An Exit Strategy – Dispute Settlement Provisions Matter

So what happens when you decide to take the plunge – how do you protect yourself? Like enamored paramours, too often new business partners refuse to think about what might go wrong. Do not focus solely on the marriage-end of your deal. Sometimes divorces happen and ignoring the possibility that a deal may sour creates significant business risks.

Administrative Enforcement – Counterfeits and Trademark Infringement

A preliminary note: arbitration is not possible for all problems. Because parties must agree to arbitrate disputes, enforcing IP rights against counterfeiters and trademark violators – that is, those with whom there is no contract – often requires using the local courts or resorting to administrative remedies. An article drafted for the ABA’s Intellectual Property Law Newsletter provides some helpful guidance – see <http://www.abanet.org/intelprop/newsletter/IPLSpring07.pdf> at 10-12.

Dealing With Counterfeiters

For problems with counterfeiters, the Technical Supervision Bureau (**TSB**) should be on your speed-dial. They have the typical authority you might expect the government anti-piracy gurus to have, such as the ability to examine documents and conduct investigations. But their power to conduct raids quickly is truly impressive – the Shanghai TSB office advised the attorneys drafting the ABA article that such decisions could be made in “several days” (as opposed to the three to six months it takes to navigate their system to a formal decision).

Dealing With Trademark Violators

For problems with trademarks, you should turn to the State Administration of Industry and Commerce (**AIC**). Although they have much of the same power in the trademark context that the TSB has vis-à-vis counterfeiters, according to the ABA article, typically the most they do is seize products.

Be Creative – Call the Fire Department

The ABA authors suggest an additional point worthy of mention: consider dusting-off the child labor, safety, health, and fire code laws. As they note, “[w]hile these departments may not have the

power to seize counterfeit products, there is some advantage in having them conduct a surprise inspection, which would disrupt production at the factory and may result in penalties for non-IP issues. Furthermore, if counterfeits are found during the surprise visit the trademark owner will be in a better position to lodge a complaint with the [relevant] administrative bodies[.]”

Arbitration in China –Factors to Consider

So what factors should you consider once you decide to enter China and agree with the recommendation to build dispute settlement into your agreements? Because you recognize the major problems associated with relying on local courts to resolve disputes, including transparency, evidentiary defects, and political interference, you may consider an arbitration provision. To be clear: arbitration does not immunize you from these ills. But careful consideration of arbitration options may help cure some (if not all) of them.

Quick Checklist

Here is a quick “what’s critical” when considering arbitration in China. Doubtless other items may be added, and with good reason. But these should be on everyone’s To Do list to noodle:

**** Power of Attorney.** Have you drafted a precise and defined power of attorney for your counsel, and do you want Chinese lawyers or international counsel?

**** Choice of Commission.** Will you use the China International Economic and Trade Arbitration Commission (**CIETAC**) or the Beijing Arbitration Commission (**BAC**)? Is there a reason for not using other Asian forums (such as the Hong Kong International Arbitration Centre (**HKIAC**) or the Singapore International Arbitration Center (**SIAC**))? How about those in Europe (such as the ICC’s International Court of Arbitration in Paris (**ICC**), the Stockholm Chamber of Commerce (**SCC**), or the London Court of International Arbitration (**LCIA**)) or in the United States (the AAA’s International Center for Dispute Resolution (**ICDR**) or even **JAMS**).

Be careful, here. If there is a chance you will need to have your award enforced in China, you may be safer with CIETAC or the BAC. In deciding between the two, consider whether you care if staff members may serve as arbitrators (CIETAC) or not (BAC). What is the value of your dispute in relation to the relevant fees for registering your complaint with the Commission? How long will your case take and what is the track record for each Commission concerning the subject matter of your dispute?

**** Choice and Appointment of Arbitrators.** Do you want one arbitrator or three? Does it matter if a third arbitrator is a national of a disputing party?

**** Arbitration Rules.** What rules will best serve your interests?

**** Language of Arbitration.** Do you care if the arbitration is in Chinese? What are the risks of having the arbitration in two official languages? How can this delay the case (and would delay be in your interest)?

Remember You Are in China – Be Prepared to Compromise

In the United States, lawyers often joke that winning a huge verdict only provides a chit for negotiations. In other words, start your engines to enforce the judgment, fight an appeal, or both. In international arbitration, the trend is to take a page from litigation before U.S. courts. For example, in *Karaha Bodas v. Pertamina, et al.*, the case turned into a global enforcement of a \$261 million arbitration award against the Indonesian national oil company; in *Vivendi Universal v. Argentina*, Vivendi requested annulment of the arbitrator's award pursuant to Article 52 of the ICSID Convention.

In China, take these trends to heart as you chant the following four-step mantra for managing your business dispute: (1) negotiation is key; (2) legal proceedings – including arbitration – help your negotiation ... sometimes; (3) politics are important (particularly if you can call on a powerful trade association, embassy official, or local government contact to act as a pressure point for what is right; and (4) be prepared to compromise. In short, recall that the reason you ventured thousands of miles away was the prospect of doing business. Sometimes it is important to stand on principle and fight, costs and consequences be damned. But (very?) often it is helpful to take a step back, recall the big picture, and figure out how you can best resolve the dispute so that you may get back to what it is you do best – your business. And that means compromise. Or if you're Deng Xiaoping, shrug, wink, and spout: "It doesn't matter if a cat is black or white, as long as it catches mice."